Supreme Court, U.S.
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No. 99-86

In The

Supreme Court of the United States

WHEELING & LAKE ERIE RAILWAY COMPANY,

Petitioner,

v.

PUBLIC UTILITY COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Whether an assessment by the Commonwealth of Pennsylvania against a railroad for a small portion of the construction cost of a bridge which crosses the railroad right-of-way is a tax within the meaning of 49 U.S.C. § 11501.

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STATEMENT OF THE CASE

The Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. § 11501 was enacted to ensure the fair treatment of railroads by local governmental agencies. The purpose of the Act was not to give railroads a free ride but only a fair ride. The interpretation of § 11501 urged by the petitioners would create a free ride for railroads and run contrary to the intent of Congress and decisions of this Court.

The Wheeling & Lake Erie Railway Company subleases a railroad right-of-way in Scott Township, Pennsylvania, which passes under Old Washington Pike. The bridge which carried Old Washington Pike over the railroad right-of-way became so deteriorated that it was closed in 1982. A new bridge was constructed.

The Pennsylvania Public Utility Commission regulates the construction and maintenance of rail-highway crossings, 66 Pa. C.S.A. § 2702. The cost of construction and maintenance of the bridge shall be paid by the public utility, municipal corporation, or the commonwealth in such proportions as determined by the Pennsylvania Public Utility Commission after due notice and hearing. 66 Pa. C.S.A. § 2704. Following a hearing, the Wheeling & Lake Erie Company was assessed only 3% of the construction costs and 15% of the maintenance costs excluding snow and ice removal. The Pennsylvania Public Utility Commission ordered the following additional payments for cost of construction:

(a)	Pennsylvania Department of Transportation	7%
(b)	Scott Township, Pennsylvania	87%
(c)	Consolidated Rail Corporation	3%

The maintenance costs were assessed totally to Scott Township for snow and ice removal and for all other maintenance, 70% to Scott Township and the remaining 30% to be divided equally between the railways. Consolidated Rail Corporation is not a party to this litigation.

The construction of the new bridge allowed Wheeling & Lake Erie Railway Company to maintain its right-of-way as it constructed the same in the early 1900's. Prior to the railway constructing its right-of-way, there was no bridge in the area and the bridge was built only after the railroad developed the right-of-way. The railroad derives a clear and unique benefit from the bridge and was assessed only a very small portion of the construction and maintenance costs of the same by the Pennsylvania Public Utility Commission.

Wheeling filed suit seeking declaratory relief that the assessment violated § 306 of the Railroad Revitalization and Regulatory Reform Act of 1976. Following discovery, all parties filed Cross-Motions for Summary Judgment. On September 3, 1996, the Magistrate Judge issued his Report and Recommendation recommending that Wheeling & Lake Erie Railway Company's Motion for Summary Judgment be granted and that the Motions of the Pennsylvania Public Utility Commission and Scott Township be denied. On October 11, 1996, the District Court adopted the Report and Recommendation and entered an Order permanently enjoining respondents from assessing or collecting from Wheeling & Lake Erie Railway Company any costs associated with the construction or maintenance of the bridge. Timely Notices of Appeal were filed by the Commission and Scott Township.

The Third Circuit Court of Appeals reversed the decision of the District Court. The Third Circuit Court of Appeals held that the assessment by the Public Utility Commission against Wheeling & Lake Erie Railway Company for a small portion of the construction and maintenance costs of the bridge, which crossed their right-of-way and from which they derived a clear and direct benefit, was not a tax within the meaning of § 11501.

REASONS FOR DENYING THE WRIT

THE DECISION OF THE THIRD CIRCUIT COURT OF APPEALS DOES NOT CONFLICT WITH DECISIONS OF THIS COURT OR OTHER CIRCUIT COURTS.

The statute at issue does not define the term "tax" and therefore the Third Circuit Court of Appeals properly began its analysis with this Court's decision in *Department of Revenue of Oregon v. ACF Industries*, 510 U.S. 332, 114 S.Ct. 843, 127 L.Ed. 2d 165 (1994); the only decision of this Court interpreting the applicable section of the Railroad Revitalization and Regulatory Reform Act of 1976. In *Department of Revenue of Oregon v. ACF Industries, supra.*, this Court set forth the standard to be applied in determining whether the assessment at issue was a "tax" within the meaning of § 11501(b)(4).

> "In determining the breadth of a federal statute that impinges upon or pre-empts the state traditional powers, we are hesitant to extend the Statute beyond its evident scope. We will interpret a Statute to pre-empt the traditional state

> powers only if that result is 'the clear and manifest purpose of Congress.' ".

Id. at 345, 114 S.Ct. at 850-51 (citations omitted). Applying this standard, the Third Circuit properly concluded that the assessment was not a tax within the meaning of the statute.

In *Department of Revenue of Oregon v. ACF Industries, supra.*, this Court considered a challenge to a state tax system with exempted certain property from taxes, but not railroad property. The Court determined that this challenge could not be made under § 11503(b)(4). After analyzing the language of the Act, the Court concluded that the tax simply did not fall within the meaning of § 11503(b)(4). The Court also set forth the extent of the exemption granted under this section.

The Court initially determined that § 11503(b)(4) sets limits upon the taxing authorities of state government. The Court concluded that it will only interpret a statute to pre-empt a traditional state power if that result is a clear and manifest purpose of Congress. In the present matter, § 11503(b)(4) does not meet the standard in relation to an assessment against a railroad for a small portion of the cost of constructing a bridge which crosses the railroad's right-of-way. Nowhere in the statute or legislative history is there any reference to assessments for construction projects such as a bridge or a culvert. Finding this assessment to be a "tax" would go beyond the clear intent and purpose of Congress.

Nothing in the legislative history would suggest that the railroads in pressing for the passage of this Act were

concerned about assessments for construction and maintenance costs of bridges at railroad crossings. Congress was not attempting to limit the authority of states to assess railroads for the costs of construction or maintenance of bridges at railroad crossings in passing the Railroad Revitalization and Regulatory Reform Act. Prior to the passage of the Act, states, including Pennsylvania, were assessing railroads a portion of the costs of construction at railroad crossings. *See Department of Highway v. Pennsylvania Public Utility Commission*, 182 A.2d 267 (Pa. Super. 1962); *Chicago & Northwestern Transportation Company v. Webster County*, 71 F.3d 265 (8th Cir. (Iowa) 1995). Nothing in the legislative history suggests Congress intended to change or forbid this long standing practice.

The only decision of another circuit addressing the issue of whether an assessment is a tax within the meaning of the Act, determined that such assessment was not a tax. In *Chicago & Northwestern Transportation Company v. Webster County, supra.*, the defendant decided to enlarge the drain through the railroad's right-of-way and ordered the railroad to install new culverts. The railroad refused and the defendant proceeded to install the culverts and subsequently billed the railroad. After the railroad refused to pay, suit was brought against the railroad to collect the costs. The state action seeking the cost of building the culverts was stayed and the railroad brought suit in Federal Court seeking a declaration that the cost of the culvert was a discriminatory tax within the meaning of § 11503(b).

In deciding that the assessment was not a tax, the Eighth Circuit initially reviewed prior case law of this

Court regarding the definition of a tax. The Court initially reviewed the definition of a tax in the *Head Money Cases*, 112 U.S. 580 (1884). The Court in that case determined that a tariff imposed upon ship owners of $0.50 for each immigrant passenger was not a tax. The Court concluded that it was not a tax because the money raised did not go to the general support of government, but instead solely to regulate immigration. Likewise, the assessment herein does not raise revenue for the general fund of the Township or Commonwealth. This definition of taxes has been reiterated in subsequent cases, and was followed by the Third Circuit and Eighth Circuit in finding assessments are not taxes under § 11503.

The decision of the Third Circuit Court of Appeals and the Eighth Circuit in *Chicago & Northwestern Transportation, supra.*, properly concluded that the Congress did not intend to forbid a long standing practice of states assessing railroads a portion of the construction costs for railroad crossings. In both instances, the Courts concluded that the Railroad Revitalization and Regulatory Reform Act did not preclude a state from assessing a portion of that cost to the railroad. In both instances, the railroad benefitted from the construction at the crossing, and was properly assessed a portion of the costs. The railroad is only being required to pay a portion of a construction project for which they received a unique and direct benefit. Only the railroad requires the crossing be built so it is able to maintain their right-of-way. Congress did not preclude states from making assessments against railroads for improvements at railroad crossings.

The traveling public and railroad must share a railroad crossing and improvements to the crossing benefit

both groups. The bridge was built and must be maintained in order to allow the railroad to maintain its right-of-way. The Pennsylvania Public Utility Commission is empowered to regulate crossings in order to protect the public's safety and rights of all utilities. 66 Pa. C.S.A. § 2702. The railroad in this matter clearly derived a benefit from the construction and maintenance of the bridge. The Pennsylvania Public Utility Commission determined the cost of that benefit to be 3%. The legislative history does not support the argument that Congress intended to strip states of power to regulate railroad crossing by assessing a railroad a portion of construction costs in order to allow the railroad to maintain its right-of-way and the state to protect the safety of both the railroad and the traveling public. Both Circuit Courts addressing this issue have properly held that the assessments for improvements at railroad crossings are not a tax within the meaning of the Act.

The petitioner also argues that the ruling by the Third Circuit Court of Appeals leads to an anomalous result by holding that an assessment by the Public Utility Commission is not a tax for purposes of § 11501, but is a tax for purposes of 45 U.S.C. § 546(b) and § 581(c)(5) [now 49 U.S.C. § 2430(k) and (l)], statutes which exempted the National Railroad Passenger Corporation and certain commuter authorities such as Southeastern Pennsylvania Transportation Authority from state and local taxation. In *National Railroad Passenger Corporation v. Pennsylvania Public Utility Commission*, 848 F.2d 436 (3rd Cir. (Pa.) 1988), the Third Circuit was considering the extent of the exemption granted to Amtrak under § 546(b) which provides:

> "Notwithstanding any other provision of law, the National Railroad Passenger Corporation, the 'corporation' shall be exempt from *any taxes or other fees* imposed by any State, political subdivision of the State, or local taxing authority which are levied on the corporation, or any railroad subsidiary thereof, from and after October 1, 1988 . . . " (Emphasis added.)

The precise issue considered by the Court was whether the phrase "any taxes or other fees" covered charges imposed against Amtrak for the building and maintenance of a bridge which crosses their tracks. In reaching its conclusion that the statute reached and exempted Amtrak from assessments for the construction and maintenance of bridges which crossed the railroad, the Court relied on various points of law in statutory construction:

(a) When a tax exemption is granted to a private entity, the statutory language is construed closely;

(b) The intent of the legislature is pivotal in determining the extent of any tax exemption;

(c) Amtrak is not a private entity and is closely aligned to the Federal Government, and therefore, the Court will interpret the exemption at issue consistent with federal immunity from local taxes. The Court in reaching its decision was guided by the principles of federal supremacy; and

(d) The statute was given a broad interpretation to fulfil the perceived intent of Congress.

Initially, the plaintiff herein is not aligned with the Federal Government but rather a private entity such that it cannot claim any federal tax exemption or rely on the principles of federal supremacy. Rather, the interpretation of the statute at issue in this case must be construed narrowly and not broadly as was done in the Amtrak case. In *Department of Revenue of Oregon v. ACF Industries, supra.*, this Court determined that § 11503(b) should be narrowly construed since Congress is attempting to restrict the powers of the state to impose taxes on private entities. The intent of Congress is paramount in the interpretation of the statute limiting the powers of states to tax, and the Court in the Amtrak decision was not determining Congressional intent with regard to the Railroad Revitalization and Regulatory Reform Act.

Additionally, in the Amtrak decision, the Third Circuit Court of Appeals did not rule whether construction and maintenance costs were a tax. The phrase at issue in the Amtrak decision was "taxes or other fees" and the Court never specifically addressed whether assessments would be a tax, even under the statute applicable to Amtrak. Therefore, the decision herein, and the decision by the Third Circuit in the *National Railroad Passenger Corporation v. Pennsylvania Public Utility Commission*, are not in conflict and do not create an anomaly in Pennsylvania.

The Third Circuit Court of Appeals properly concluded that the assessment by the Pennsylvania Public Utility Commission was not a tax within the applicable statute by relying on prior decisions of this Court. Furthermore, the decision of the Third Circuit Court of Appeals is in agreement with the decision of the Eighth

Circuit Court of Appeals, the only other Circuit Court to rule upon the issue of whether assessments are taxes within the meaning of the applicable statute.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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